

1 YAVAPAI COUNTY ATTORNEY'S OFFICE
2 JOSEPH C. BUTNER, SBN 005229
3 DEPUTY COUNTY ATTORNEY
4 255 East Gurley Street
5 Prescott, AZ 86301
6 Telephone: 928-771-3344
7 ycao@co.yavapai.az.us

FILED
2010 SEP 27 AM 7:43
FILED
~~Ivy Rios~~
DEPUTY CLERK

8
9 **IN THE SUPERIOR COURT OF STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 **STATE OF ARIZONA,**

12 **Plaintiff,**

13 **v.**

14 **STEVEN CARROLL DEMOCKER,**

15 **Defendant.**

Cause No. P1300CR20081339

**STATE'S MEMORANDUM OF LAW RE
DISMISSAL WITH PREJUDICE AFTER
SHERIFF [REDACTED]**

**Honorable Warren Darrow
Division 6**

FILED UNDER SEAL

16
17
18 The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney,
19 and her deputy undersigned, provides this Memorandum of Law in response to this Court's
20 order regarding its consideration of Defendant's most recent motion to dismiss this case with
21 prejudice.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 Defendant requests that the first degree murder charges against Defendant be
24 dismissed with prejudice because Sheriff Waugh [REDACTED]
25 [REDACTED]. The
26 Motion must be denied for the following reasons.

RECEIVED

SEP 27 2010

DIVISION 6

1. The County Attorney is not bound by the actions of the Sheriff's Office.

Sheriff Waugh [REDACTED] The County Attorney had no involvement in the filing, was unaware of the filing, and did not benefit in any way from the filing. A balancing of Defendant's right to counsel and society's strong interest in administration of criminal justice must be weighed. *State v. Warner*, 150 Ariz. 123, 722 P.2d 291 (1986).

In *Warner* the Sheriff's Office seized documents from Warner's cell, some of which were transcripts or a memorandum of conversation between Warner and his counsel. The documents were given to the County Attorney, who began reading them, but avowed that he stopped reading the documents upon realization of what was included, and did not obtain any information from them. The Supreme Court remanded the case to the trial court for a determination of "how, if at all, defendant was prejudiced by the state's intrusion, with the burden on the state to prove defendant was accorded a fair trial." 150 Ariz. at 128, 722 P.2d at 296. The Court went on further to hold:

In this and all further cases where the state invades the attorney-client relationship and interferes with a defendant's right to counsel the state has the burden to demonstrate that no evidence introduced at trial was tainted by the invasion.

Id.

The State did not violate Defendant's right to counsel by Sheriff Waugh's [REDACTED] [REDACTED] The Yavapai County Attorney's Office has not and will not benefit from any perceived invasion of Defendant's right to counsel from such a filing. There has been no interference with Defendant's right to a fair trial.

2. There is an absolute privilege extended to anyone who [REDACTED]

[REDACTED]

1 Rule 48(l), Rules of Professional Conduct, provides that "[c]ommunications to the
2 court, state bar, ... relating to lawyer misconduct, lack of professionalism or disability, and
3 testimony given in the proceedings shall be absolutely privileged conduct, ..." (emphasis
4 added). To impose consequences on the State of Arizona for the [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 In 1980 the State Bar of Arizona filed an *amicus curiae* brief and described its
8 position relating to this now-codified provision. In *Drummond v. Stahl*, 127 Ariz. 122, 681
9 P.2d 616 (App. 1980) civil litigation was commenced regarding both a determination of
10 counsel issue (potential conflict of interest) and [REDACTED]. The
11 Court of Appeals noted the State Bar's position as follows:

12 The State Bar of Arizona contends that public policy dictates that there must
13 be immunity to all persons from any liability arising from the [REDACTED]
14 [REDACTED]

15 ...

16 ... [T]o allow a "conditional" privilege would allow the institution of a civil
17 action by the mere addition of an "actual malice" allegation. This would
18 permit a civil action against anyone who has [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

1 127 Ariz. at 126, 618 P.2d at 620.

2 Sheriff Waugh, as well as any other person in Arizona, [REDACTED]

3 [REDACTED]
4 [REDACTED] Imposing the ultimate sanction of dismissal with prejudice for exercising this
5 right would have a chilling effect on the fair administration of justice and is disfavored by
6 the Supreme Court, [REDACTED]
7

8 3. The Court must ensure that the citizens of the State of Arizona are heard.

9 Rule 2.6(A), Arizona Code of Judicial Conduct, provides that "[a] judge shall accord
10 to every person who has a legal interest in a proceeding, or that person's lawyer, the right to
11 be heard according to law." The comment to that Rule provides:

12 1. The right to be heard is an essential component of a fair and
13 impartial system of justice. Substantive rights of litigants can be protected
14 only if procedures protecting the right to be heard are observed.

15 This Court's consideration of the possibility of dismissing this case with prejudice is
16 "chilling" the Yavapai County Sheriff's [REDACTED]
17 [REDACTED]

18 4. The State has not interfered with Defendant's 6th Amendment right to
19 counsel.

20 "The guarantees of the Sixth Amendment include the right to an attorney with
21 undivided loyalty. Counsel must be free to zealously defend the accused in a conflict-free
22 environment." *Romley v. Schneider*, 202 Ariz. 362, 364, 45 P.3d 685, 687 (App.2002)
23 (citations omitted). *See also United States v. Greig*, 967 F.2d 1018, 1021 (5th Cir.1992) (A
24 defendant's right to effective assistance of counsel includes the right to representation free
25 from a conflict of interest.) It has long been held that "like the right to counsel of any kind,
26

1 the right to conflict-free counsel can be waived.” *Greig* at 1021 (citations omitted). For a
2 waiver to be effective, the record must show that the trial court determined that it was
3 knowingly, intelligently, and voluntarily done. *Id.*

4 “A court disqualifying an attorney may base its ruling on one of two grounds: (a)
5 conflict of interest, and (b) integrity of the judicial system.” *United States v. Snyder*, 707
6 F.2d 139, 145 (5th Cir.1983) (abrogated on other grounds).
7

8 Under the conflict of interest analysis, the trial judge ordinarily attempts to
9 determine whether the interests of the attorney conflict with those of his
10 client. A finding that there is a conflict does not, however, end the analysis. In
11 *United States v. Garcia*, 517 F.2d 272 (5th Cir.1975), we recognized that
12 defendants may waive their right to conflict-free representation. *Id.* at 275. An
13 accused's right to waive conflict-free representation may not be absolute.
14 Where the conflict of interest was so serious as to render a trial inherently
15 unfair, we have held that the accused has been deprived of his right to
16 effective assistance of counsel. *Uptain v. United States*, 692 F.2d 8, 10 (5th
17 Cir.1982).

18 *Id.*

19 First, there has been no showing that there is a conflict of interest between Defendant
20 and his defense team. In fact, the showing is to the contrary. Second, the conflict arising in
21 this case is such that it could be waived by Steven DeMocker (and may already have been
22 waived in an ex parte proceeding). Third, any such conflict was not created by the Sheriff or
23 the County Attorney's Office, but rather is one that was created by the Defendant's own
24 actions in manufacturing evidence and persuading his attorneys to use that fraudulent
25 evidence. [REDACTED]
26 [REDACTED]

5. Dismissal with prejudice is not appropriate under the facts.

When considering dismissal with or without prejudice the Court must consider 16A
A.R.S. *Rules of Crim. Proc.*, Rule 16.6(d). That rule provides:

1 Amendment deprivations are subject to the general rule that remedies should be tailored to the
2 injury suffered from the constitutional violation and should not unnecessarily infringe on
3 competing interests." 449 U.S. at 363, 101 S.Ct.668. The Court reversed a dismissal of the
4 indictment and characterized it as "inappropriate." 449 U.S. at 367. The Court stated, "Our
5 approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in
6 the circumstances to assure the defendant the effective assistance of counsel and a fair trial."
7 449 U.S. at 365. There has been no showing of intentional prosecutorial misconduct and there
8 has been no showing of actual prejudice to the defense. There is no evidence that the State has
9 engaged in any misconduct whatsoever.

11 Conclusion

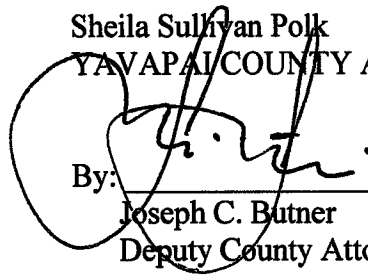
12 The defense team is attempting to shift responsibility for the actions of the Defendant
13 in manufacturing evidence and offering it before the Court. The fact that [REDACTED]
14 [REDACTED] has nothing to do with their predicament and
15 changes nothing about their ability to represent defendant Steven DeMocker. Immunity to
16 all persons [REDACTED]
17 [REDACTED]

19 The suggestion that the Yavapai County Attorney's Office should be disqualified for
20 some unspecified interest that is inconsistent with the duty to safeguard justice, citing
21 *Villalpando v. Reagan*, 211 Ariz. 305, 121 P.3d 172 (App. 2005) is absurd. *Villalpando* held
22 there was no error when the Scottsdale City Prosecutor's Office disqualified itself from
23 prosecuting a City of Scottsdale employee for D.U.I. and referred the case to the Mesa City
24 Prosecutor's Office. There is no demonstrated interest in the Yavapai County Attorney's
25
26

1 Office other than the duty to "seek justice" in the prosecution of Steven DeMocker.
2 Therefore, there is no reason for the Yavapai County Attorney's Office to be disqualified.

3 RESPECTFULLY SUBMITTED this 27th day of September , 2010.

4 Sheila Sullivan Polk
5 YAVAPAI COUNTY ATTORNEY

6 
7 By: _____
8 Joseph C. Butner
9 Deputy County Attorney

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1 COPIES of the foregoing delivered this
2 ~~27th~~ day of September, 2010, to:

3 ~~30th~~
4 Honorable Warren Darrow
5 Division 6
6 Yavapai County Superior Court
7 (via email)

8 John Sears
9 511 E.. Gurley St.
10 Prescott, AZ 86301
11 Attorney for Defendant
12 (via email)

13 Larry Hammond
14 Anne Chapman
15 Osborn Maledon, P.A.
16 2929 North Central Ave, 21st Floor
17 Phoenix, AZ
18 Attorney for Defendant
19 (via email)

20 Christopher B. DuPont
21 Trautman DuPont
22 245 West Roosevelt, Suite A
23 Phoenix, AZ 85003
24 Attorney for victims
25 Katherine and Charlotte DeMocker
26 (via email)

John Napper
634 Schemmer, Ste 102
Prescott, AZ 86305
Attorney for Renee Girard
(via email)

22 By: Robert Cornwell
23
24
25
26